

# Year 2002 Changes or Modifications to the Federal Rules of Criminal Procedure<sup>1</sup>

## Note Well:

-The **Federal Rules of Criminal Procedure** have been totally revamped, although not necessarily changed. Every Rule has some different wording or phrasing in it. Many of the changes/modifications reflect an attempt to modernize and simplify the language. There are some substantive changes and/or emphases that the “old” rules did not reflect. There are also some changes which appear to make a significant change but when read in conjunction with the Advisory Notes or other revised sections do not. To see how some of the “changes” might be misread, see the discussions for Rules 5(a)(1) and 5.1(e), below.

-The below outline provides an overview of some of the changes/modifications which will more likely impact the practice of criminal procedure. However, the actual impact will greatly depend on the type of crimes and/or the geographical region in which the crimes are being prosecuted.

-Many of the “new language” revisions are not discussed below. Generally, “new” provisions or provisions which have been modified which might have a greater impact are highlighted. Everyone would be well advised to “crack the book” and read through the all of the Rules.

## Rule 3: The Complaint

- Compliant must be sworn before a U.S. magistrate judge, or state or local officer; the procedure must take place before a federal judicial officer if one is reasonably available *[Note: as stated in Rule 1(c), where a magistrate is authorized to act, any other federal judge may act]*

## Rule 4: Arrest Warrant or Summons on a Complaint

### (a) Issuance

- Greater discretion given to judges when someone fails to respond to a summons  
- they can choose whether or not to issue an arrest warrant, so long as the attorney for the government does not request that such a warrant be issued for a failure to appear

*[Note: old Rule 4(b) deleted – No substantive change, although language referring to fact that “hearsay” may be used to support probable cause, has been deleted. Committee felt this was clearly supported by the case law, and only confused what other evidence may be considered.]*

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<sup>1</sup> This Overview/Outline was prepared by AUSA Martin Littlefield (WDNY) with major assistance from WDNY Law Clerk Andrew Connelly.

**(b) Form**

**(1) Warrant**

(C) - warrant **must require** that defendant be brought before a judge “**without unnecessary delay**”. *[Note: time is of the essence; preferably brought before a fed. judicial officer]*

(2) - if a summons is issued, defendant **must** appear before a magistrate judge *[Note: because this only includes federal magistrates, is consistent with the preference for a Federal Judicial Officer expressed in Rule 4(b)(1)]*

**(c) Execution or Service, and Return**

**(2) Location**

- **includes language reflecting the Military Extraterritorial Jurisdiction Act**, which permits arrests of certain military and Department of Defense personnel overseas.

**(3) Manner**

(A) - requires arresting officer in **all instances** to inform the defendant of the offense charged and of the fact that an arrest warrant exists.

(C) - in **all cases** in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

**(4) Return**

(A) - after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. **At government’s request, however, an unexecuted warrant must be canceled by a magistrate judge.** *[Note: this recognizes the possibility that, at time of warrant execution, issuing judicial officer may not be available].*

**Rule 5: Initial Appearance**

**(a) In General**

**(1) Appearances Upon an Arrest**

-**Only if a magistrate judge is not reasonably available**, should a defendant be taken before a state or local officer. *[Note: The new language in this part of the Rule initially appears to allow the appearance to take place either before a federal magistrate or a state/local judge; however, when read in conjunction with 5(c)(1)(B), it is clear that the defendant must be brought before a federal magistrate unless he/she is not **reasonably available**.]*

(B) - **right to an initial appearance applies** not only when a person is arrested within the United States but also **when an arrest occurs outside the United States**. *[Note: this should be done before a federal magistrate judge];* also words “**unless a federal statute provides otherwise**” **have been added**, reflecting enactment of the Military Extraterritorial Jurisdiction Act, permitting certain persons overseas to appear before a magistrate judge by telephonic communication.

(3) Appearance Upon a Summons - (New provision)

- recognizes that defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If appearing for felony, Rule 5(d) applies; for misdemeanor, Rule 5(e) applies.

**(c) Place of Initial Appearance; Transfer to Another District - (New provision)**

**(1) Arrest in District Where the Offense Was Allegedly Committed**

- *must be taken to a magistrate judge in that district.* [Note : if no magistrate judge reasonably available, state or local judicial officer may conduct initial appearance.]

**(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed**

- must be taken to a magistrate judge within the district of arrest, **unless appearance can take place more promptly in the adjacent district.**

(f) Video Teleconferencing (New provision)

- permitted for an initial appearance if defendant consents

**Rule 5.1: Preliminary Hearing**

**(d) Extending the Time**

-expands authority of a U.S. magistrate judge to grant a continuance for a preliminary hearing conducted under the rule, even if the defendant objects

(e) Deletes the phrase that the Government may use "hearsay" during a Preliminary Hearing. However, there is a Advisory Committee Note that emphasizes that the deletion of the phrase should not be interpreted as prohibiting the use of hearsay – cross-referencing FRE 1101(d)(3).

**Rule 6: The Grand Jury**

**(b) Objections to the Grand Jury or to a Grand Juror**

**(1) Challenges** - The language : “Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.” has been removed from **this rule**. This is because, normally, a defendant will not know the composition of a grand jury or identity of the grand jurors before they are administered their oath.

**(e) Recording and Disclosing the Proceedings**

**(3) Exceptions**

**(A)**

(ii) (New Provision) - recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law.

(iii) (New Provision) - recognizes that disclosure may be made to a person under 18 U.S.C. § 3322 (authorizing disclosures to an attorney for the government and banking regulators for enforcing civil forfeiture and civil banking laws)

(D) (New Provision) : reflects changes brought about by The PATRIOT Act - permits an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties.

*(i) the federal official receiving the information may only use the information as necessary and may be otherwise limited in making further disclosures. Any disclosure made under this provision must be reported under seal, within a reasonable time, to the court. "Foreign intelligence information" is defined in rule 6(e)(3)(D)(iii).*

(E) *"court may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs - of a grand-jury matter..."*

(iv) (New Provision) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

#### **(g) Discharging the Grand Jury**

- *"except as otherwise provided by statute" added* to recognize the provisions of 18 U.S.C. § 3331 relating to special grand juries.

(i) "Indian Tribe" Defined (New provision)  
- defines "Indian Tribe"

### **Rule 9: Arrest Warrant or Summons on an Indictment or Information**

#### **(a) Issuance**

- gives judges *discretion* whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. *If the defendant fails to appear after a summons, and the government requests that a warrant be issued, the judge must issue one.* In the absence of such a request, the judge has the *discretion* to do so.

#### **(b) Form**

(1) *deleted language permitting court to set the amount of bail on the warrant*  
(Note: this was done to make rule consistent with the 1984 Bail Reform Act).

## **Rule 10: Arraignment**

*-Two exceptions created to requirement that defendant be physically present in the court for the arraignment :*

### **(b) Waiving Appearance**

(1) The court *may* hold an arraignment in the defendant's absence when the defendant and counsel in writing have executed a pleading in which: the defendant waives the right to be present, acknowledges receipt of the Indictment and the defendant specifically pleads not guilty in the pleading; and the court consents to that waiver.

### **(c) Video Teleconferencing**

(2) court may hold arraignments by video teleconferencing when the defendant is at a different location.

*-**Note:*** the Rule does not require the waiver for video teleconferencing to be in writing. Nor does it require that the defendant waive the appearance in person in open court - they can normally waive an appearance while participating through a video conference.

*-**Note:*** the Rule does not specify whether the defendant must be in the District (i.e.- at Batavia Facility) — presumably, as long as the defendant waives, he/she could be anywhere for the arraignment.

*-**Note:*** the court may reject the waiver and require defendant to appear in court if for example, the court believes the defendant's presence is important in resolving particular matters, or if an attorney for the government presents reasons for requiring the defendant to appear personally.

***Note:*** this amendment does not permit waiver of an appearance when the defendant is charged with a felony information - in that case, defendant is required by Rule 7(b) to be present in court to waive the indictment.

***Note:*** this amendment does not permit a waiver of appearance when the defendant is standing mute, or entering a conditional plea, a nolo contendere plea, or a guilty plea.

***Note:*** also, it is important to note that this amendment does not allow the defendant to waive the arraignment itself, only his personal appearance.

## **Rule 11: Pleas**

### **(b) Considering and Accepting a Guilty or Nolo Contendere Plea**

#### **(1) Advising and Questioning the Defendant**

*-list expanded to include: maximum or minimum term of imprisonment,*

forfeiture, fine, and special assessment, restitution and supervised release.

**(c) Plea Agreement Procedure**

**(1) In General**

(A) includes a change, which recognizes a common type of plea agreement - that the government will ***“not bring”*** other charges.

(e) **Finality of a Guilty or Nolo Contendere Plea:** *not possible for a defendant to withdraw their plea after sentence has been imposed; also, “collateral attack” added to recognize that in some instances a court may grant collateral relief under provisions other than 28 U.S.C. § 2255. [Note: – Formerly addressed under Rule 32(e).]*

**Rule 12: Pleadings and Pretrial Motions**

(c) *reference to the “local rule” exception has been deleted* to make it clear that judges should be encouraged to set deadlines for motions. (*Note: some discretion* in setting a date for motion hearings is *permitted*).

**Rule 12.1: Notion of an Alibi Defense**

- (*New requirement*) in providing the names and addresses of alibi and any rebuttal witnesses, the *parties must also provide the phone numbers of those witnesses*.

**Rule 12.2: Notice of an Insanity Defense; Mental Examination**

**(b) Notice of Expert Evidence of a Mental Condition**

- *requires* a defendant who intends to offer expert testimony, testimonial or otherwise, on the issue of his or her mental condition during a capital sentencing proceeding, to provide *pretrial notice* of such

**(c) Mental Examination**

**(1) Authority to Order an Examination; Procedures**

(B): *requires* the court to order an examination if the defendant has provided notice of an intent to raise the insanity defense under 12.2(a) and the government moves for the examination; *also court may order such an examination if the defendant does not rely on the insanity defense, but rather intends to offer expert testimony, under 12.2(b), on the issue of their mental condition at trial*

**(2) Disclosing Results and Reports of Capital Sentencing Examination**

- *adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing*

**(3) Disclosing Results and Reports of the Defendant’s Expert Examination**

- *upon disclosure under subdivision (c)(2) of the results and reports of the government’s examination, disclosure of the results and reports of the defendant’s expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.*

**(4) Inadmissibility of a Defendant’s Statements**

- provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of *expert* evidence.

**(d) Failure to Comply**

- *extends sanctions* for failure to comply with the rule *to the penalty phase of a capital case: the selection of an appropriate remedy* for failure to do so under (b) and (c) is *entrusted to the discretion of the court*; (*Note: while the court may exclude evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful."*)

**Rule 12.3: Notice of a Public - Authority Defense**

-*New Provision* : (in (a)(4) and (b)) the parties must provide the *telephone numbers of any witnesses disclosed* under the rule.

**Rule 12.4: Disclosure Statements by Corporation or Organization (New Rule)**

**(a) Who Must File**

**(1) Nongovernmental Corporate Party**

- any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. "Nongovernmental corporate party" might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

**(2) Organizational Victim**

- requires an attorney for the government to file a statement that lists any organizational victims of the alleged criminal activity; if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party. An attorney for the government must use due diligence in obtaining that information from a corporate organizational victim, recognizing that the timing requirements of Rule 12.4(b) might make it difficult to obtain the necessary information by the time the initial appearance is conducted.

**(b) Time for Filing : Supplemental Filing**

(1) indicates that the time for filing the disclosure statement is at the point when the defendant enters an initial appearance under Rule 5.

(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

**Rule 15: Depositions**

**(a) When Taken**

**(1) In General**

- the list of materials to be produced has been amended to include the expansive term "data".

**(d) Expenses**

- if the government requested the deposition, the court *must* require the government to pay *reasonable* subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the

government to pay **reasonable** subsistence and travel expenses and the deposition transcript costs - regardless of who requested the deposition. (**Note:** no limit placed on funds to be reimbursed - committee relies on “reasonable” to govern).

### **Rule 16 : Discovery and Inspection**

#### **(b) Defendant’s Disclosure**

##### **(1) Information Subject to Disclosure**

##### **(B) Reports of Examinations and Tests**

- “If defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if :

...(ii)the defendant intends to **use the item (changed from “defendant intends to introduce as evidence”)** *in the defendant’s case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness’ testimony.*

### **Rule 17: Subpoena**

#### **(c) Producing Documents and Objects**

##### **(1) In General**

- “**data**” **added** to the list of matters that may be subpoenaed.

##### **(g) Contempt**

- amended to **recognize the contempt powers of a court** (other than a magistrate judge) and a magistrate judge.

### **Rule 17.1: Pretrial Conference**

-makes clear that a pretrial conference may be held **even though** the defendant has invoked the constitutional right to self-representation.

### **Rule 20: Transfer for Plea and Sentence**

#### **(d) Juveniles**

##### **(2) Clerk’s Duties (New Rule)**

- provides that **after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.**

### **Rule 24: Trial Jurors**

#### **(b) Peremptory Challenges**

**-authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.**



### **Rule 26: Taking Testimony**

-the word “*orally*” is *deleted* to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter.

### **Rule 26.2: Producing a Witness’s Statement**

#### **(c) Producing a Redacted Statement**

- if the court withholds a portion of a statement, over the defendant’s objection, the court must seal the entire statement as part of the record, in the event that there is an appeal.

### **Rule 29: Motion for a Judgment of Acquittal**

#### **(c) After Jury Verdict or Discharge**

##### **(1) Time for a Motion**

- now includes language that a motion for judgment of acquittal *must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later*. (Note: court may set another time for the defendant to make or renew the motion, if it does so within the 7-day period).

### **Rule 30: Jury Instructions**

#### **(a) In General**

- change in the timing of requests for instructions : *Permits a court to direct the parties to file such requests before trial in a particular case or as a matter of local practice under local rules promulgated under Rule 57*. (Note : does not preclude practice of permitting parties to supplement their requested instructions during the trial).

### **Rule 32: Sentencing and Judgment**

#### **(a) Definitions**

(2) The committee *expanded the definition of victims of crimes of violence or sexual abuse to include victims of child pornography under 18*.

#### **(h) Notice of Possible Departure from Sentencing Guidelines (New provision)**

- “Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.”

#### **(i) Sentencing**

##### **(3) Court Determinations**

- narrows the requirement for court findings to those instances when an objection to a presentence report addresses a “*controverted matter*.” If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

##### **(4) Opportunity to Speak**

##### **(B) By a Victim**

- victims included under revised rule 32(a)(2) will now be permitted to address the court

**(C) In Camera Proceedings**

- Any party may now move (for good cause) that the court hear any statement - by a party or a victim - made under revised Rule 32(i)(4).

**Rule 32.1: Revoking or Modifying Probation or Supervised Release**

**(a) Initial Appearance**

**(1-4) (New provisions)**

- establish the procedure for conducting initial appearance for defendant charged with violating probation or supervised release (Note: although an initial appearance is required by this rule, the committee also noted that nothing in the rule prohibits a court from combining the initial appearance proceeding, if convened consistent with the “without unnecessary delay” time requirement of the rule, with the preliminary hearing under Rule 32.1(b)).

**(b)(1)(B)(iii) (Preliminary Hearing) and (b)(2)(C) (Revocation Hearing)**

- recognize that the court should apply a balancing test at the hearing itself when considering the releasee’s asserted right to cross-examine adverse witnesses. The court is to balance the person’s interest in the constitutionally guaranteed right to confrontation against the government’s good cause for denying it.

**(c) Modification**

**(2) Exceptions**

(A) - permits the person to *waive a hearing* to modify the conditions of probation or supervised release (*Note* : although this language is new, committee feels this reflects current practice).

**Rule 35: Correcting or Reducing a Sentence**

**(b) Reducing a Sentence for Substantial Assistance**

**(2) Later Motion**

(B) - a sentence reduction motion is now permitted when a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until for than one year after sentence imposition

(C) - a post-sentence motion is also now appropriate in those instances where the defendant did not provide any information within one year of sentencing, because its usefulness was not reasonably apparent to the defendant during that period. However, it is required that once the defendant realizes the importance of the information, the defendant promptly provide the information to the government. [*Note: What constitutes “prompt” notification will depend on the circumstances of the case.*]

[*Note: by using the term “involves” in (b)(2) in describing the sort of information that may result in substantial assistance, the Committee recognizes that a court does not lose jurisdiction to consider a Rule 35(b)(2) motion simply because other information, not covered by any of the three provisions in Rule 35(b)(2), is presented in the motion.*]

**Rule 41: Search and Seizure**

**(b) Authority to Issue a Warrant**

**(3) (New provision)**

- PATRIOT Act - as long as a magistrate judge has authority in a district where activities related to terrorism may have occurred, the magistrate judge may issue a warrant for persons or property not only within the district, but outside the district as well.

**(f) Executing and Returning the Warrant**

- an officer *present* during the execution of the warrant, and not necessarily the officer actually executing the warrant, must provide a receipt for the property and complete an inventory of any property seized

**Rule 42: Criminal Contempt**

**(a) Disposition After Notice**

**(2) Appointing a Prosecutor**

- ordinarily the court should request that an attorney for the government prosecute the contempt; *only* if that request is denied, should the court appoint a private prosecutor

**(b) Summary Disposition**

- amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence *without regard to whether other rules*, such as Rule 32, *might otherwise apply*; also, amended to recognize the contempt powers of a court (other than a magistrate judge) *and* a magistrate judge

**Rule 43: Defendant's Presence**

**(b) When Not Required :**

- in addition to the reasons listed in 1-4, when the court has permitted *video teleconferencing* procedures under Rules 5 and 10 or when the defendant has *waived the right to be present* for the arraignment under Rule 10; also, by inserting the word "initial" before "arraignment", (a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

**Rule 46: Release from Custody; Supervising Detention**

**(c) Pending Sentencing or Appeal**

- recognizes the apparent exception to the general rule that an appeal to a circuit court deprives the district court of jurisdiction - that is, the *district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed.*

**(h) Supervising Detention Pending Trial**

- *deleted* requirement that an attorney for the government file *bi-weekly reports* with the court concerning the status of any defendants in pretrial detention [*Note: requirement that the attorney for the government file reports regarding detained material witnesses has been retained.*]

**Rule 47: Motions and Supporting Affidavits**

**(b) Form and Content of a Motion :**

- *"orally" deleted, substituted with "by other means"* - Committee believed "orally" may have been a limitation on those who are not able to speak orally; also deleted

because a court may wish to entertain motions through electronic means

**Rule 50: Prompt Disposition**

-Rule is now : “*Scheduling preference must be given to criminal proceedings as far as practicable.*”

**Old provision (a) - *deleted*** : provision that a court may place criminal proceedings on a calendar, because it simply stated a truism.

**Old provision (b) - *deleted*** : because no longer necessary (simply mirrored 18 U.S.C. § 3165; also because of Speedy Trial Act).

**Rule 53: Courtroom Photographing and Broadcasting**

-although “broadcasting” is prohibited, the amended rule recognizes that *other rules might permit, for example, video teleconferencing*, which clearly involves “broadcasting” of the proceedings, even if only for limited purposes (**Note:** deletion of “radio” from the rule, not a substantive change because it is covered under “Broadcasting”)